

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

August 30, 1991

UNITED STATES OF AMERICA,)
Complainant)
v.) 8 U.S.C. 1324a Proceeding
TUTTLE'S DESIGN BUILD, INC.,) OCAHO Case No. 91100114
Respondent)

ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

On July 3, 1991, complainant filed the two-count Complaint at issue.

In Count I, complainant charges that on an unspecified date, but one subsequent to November 6, 1986, respondent allegedly knowingly hired and/or continued to employ one Urso Beltran Rojo, whom it was further alleged was not, at the time that respondent hired him, authorized for employment in the United States, in violation of the pertinent sections of the Immigration and Naturalization Act of 1986 (IRCA), as well as the implementing regulations.

Complainant further proposed in Count I of the Complaint that a total civil penalty of \$1,000 be assessed for that alleged violation.

In Count II of the Complaint, it is alleged that respondent also violated specific provisions of IRCA, together with the related sections of the implementing regulations, by having committed some 134 paperwork violations. That by reason of its allegedly having failed to prepare, retain, or present after request, the pertinent Employment Eligibility Verification Forms (Forms I-9), concerning the 134 individuals described therein whom it was further alleged respondent had also hired after November 6, 1986 for employment in the United States.

In Count II, complainant proposes that a total civil penalty of \$40,400 be levied, or \$500 for violation 1 and \$300 for each of the remaining 133 violations numbered 2 through 134, or a total of \$39,900 for the latter 133 violations.

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On August 9, 1991, respondent filed its Answer, which included two affirmative defenses.

In its first affirmative defense, respondent maintains that at all times relevant herein it has acted in good faith and that, should any infractions of IRCA or the implementing regulations be found, said proscribed conduct was unintentional and inadvertent.

For its second affirmative defense, respondent urges that to the extent that the pertinent Forms I-9 were prepared by respondent for the employees in question, as well as to the extent that said forms were not made available to complainant's personnel for inspection, that conduct resulted from administrative error and was similarly unintentional and not willful in character.

On August 19, 1991, complainant filed a Motion to Strike Affirmative Defenses, averring therein that neither defense has been properly asserted under these facts.

More specifically, Complainant argues that respondent's first affirmative defense is essentially good faith type argumentation, which is unavailing under the controlling authorities it has cited. U.S. v. Mester Manufacturing Co., OCAHO Case No. 87100001 (June 17, 1988); aff'd Mester Manufacturing Co. v. I.N.S., 879 F. 2d 561 (9th Cir. 1989); U.S. v. Multimatic Products, Inc., OCAHO Case No. 90100155 at 4 (August 21, 1990).

In urging that respondent's second affirmative defense should also be stricken, complainant maintains that respondent's admitted ignorance of the law and inadvertence may not be asserted in those complaints in which, as here, only paperwork violations are involved. U.S. v. Bayley's Quality Seafood, Inc., OCAHO Case No. 90100080 (September 17, 1990); U.S. v. USA Cafe, Inc., OCAHO Case No. 88100098 (February 6, 1989).

On August 23, 1991, respondent filed a pleading captioned Response in Opposition to Complainant's Motion to Strike Affirmative Defenses, in which it argues that the pertinent provisions of IRCA, at 8 U.S.C. §§ 1324a(a)(3) and 1324a(e)(5), as well as those of the implementing regulations, at 8 C.F.R. §§ 274a.4 and 274a.10(b)(2)(ii), serve as the bases for its separate good faith affirmative defense assertions to both the paperwork charge and the illegal hire/continuing employment allegations at issue.

Before proceeding, a review of the relevant wording of those statutory and regulatory sources is in order.

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The wording of 8 U.S.C. § 1324a(a)(3) provides that:

A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) of this section with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting or referral (emphasis added).

Meanwhile, the regulatory analog, 8 C.F.R. § 274a.4, of that statutory section upon which respondent relies for its good faith defense provides that:

An employer or a recruiter or referrer for a fee for employment who shows good faith compliance with the employment verification requirements of § 274a.2(b) of this part shall have established a rebuttable affirmative defense that the person or entity has not violated section 274A(a)(1)(A) of the Act with respect to such hiring, recruiting, or referral (emphasis added).

The text of 8 U.S.C. § 1324a(e)(5), in pertinent part, contains this expression:

With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than \$100 and not more than \$1,000 for each individual with respect to whom such violation occurred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations (emphasis added).

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And in the wording of 8 C.F.R. § 274a.10(b)(2)(ii), the regulatory counterpart of the second statutory provision upon which respondent buttresses its argument, this pronouncement, in pertinent part, is found:

(2) A respondent determined by the Service
(if a respondent fails to request a hearing)
or by an Administrative Law Judge to have
failed to comply with the employment
verification requirements as set forth in
§ 274a.2(b) of this part, shall be subject
to a civil penalty in an amount of not less
than \$100 and not more than \$1,000 for each
individual with respect to whom such
violation occurred. In determining the
amount of the penalty, consideration shall
be given to: **** (ii) the good faith of
the employer (emphasis added).

A review of the wording contained in these four statutory/regulatory sections, as well as the related remaining pronouncements concerning the unlawful employment of aliens, those set forth at 8 U.S.C. § 1324a, discloses that in filing complaints under that statutory authority, complainant must choose from between three factual scenarios.

The first is that factual setting in which a respondent is only charged with having violated the employment verification system, or paperwork violations, those addressed at 8 U.S.C. § 1324a(b). In that event, those statutory/regulatory guidelines provide that in such single issue complaints the good faith of the employer may only be given due consideration, as one of five enumerated criteria, in determining the appropriate civil money penalty sum to be assessed for paperwork violations, 8 U.S.C. § 1324(b)(e)(5). as opposed to being available to the respondent in of violation.

That in the event that a respondent asserts an affirmative addressing the fact(s) of fact to being ordered stricken in as here, files an appropriate

to complainant by the filing of denied, however, since under the (e)(5), as previously noted, evidence of good faith in order to the proposed civil money penalty alleged violation, rather than for filing the alleged fact(s) of violation.

The second enforcement scenario is that in which a respondent is alleged to have violated the pertinent provisions of IRCA by having unlawfully hired, and/or by having unlawfully continued to employ, unauthorized aliens for employment in the United States, and having done so subsequent to IRCA's enactment date, November 6, 1986, in violation of the provisions of 8 U.S.C. §§ 1324a(a)(1)(A) and 1324a(a)(3).

In that pleading posture, a respondent may assert good faith as a rebuttable affirmative defense, but only upon a showing of good faith compliance with the employment verification requirements set forth at 8 C.F.R. § 274a.2(b).

However, the wording of that regulation further imposes upon the asserting respondent a dual duty to demonstrate that: (1) an examination of the employee's documents has been conducted, in order to establish the individual's identity and employment eligibility; and (2) that the pertinent Form I-9 concerning that individual has been properly completed.

The third and final factual scene which may confront complainant is that which involves, as here, allegations in a multiple count complaint that a respondent has violated the provisions of 8 U.S.C. § 1324a(a), owing to the presence of an allegation of an illegal hire/continuing to employ infraction, as well as an alleged violation of the provisions of 8 U.S.C. § 1324a(b), by also including in the complaint an additional count in which a respondent is also charged with having violated IRCA's employment verification system/paperwork requirements.

In that event, a respondent may assert a rebuttable good faith affirmative defense to the count containing the alleged violation involving illegal hire/ continuing to employ, as proscribed in the wording of 8 U.S.C. § 1324a(a) and that affirmative defense will withstand the challenge set forth in a questioning motion to strike.

But when, however, as under these facts, a respondent also asserts a good faith affirmative defense to that count which alleges a violation involving the employment verification system/paperwork requirements contained in the provisions of 8 U.S.C. § 1324a(b), respondent assumes the risk of having that affirmative defense ordered stricken as a result of a prevailing motion to strike.

Even though respondent is about to be overtaken by that very eventuality in this ruling, that same evidence of good faith can be adduced for the sole and limited purpose of granting due consideration in determining the amount of the civil money penalty

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which may be ordered in this proceeding, even though that same good faith evidence will not be admitted for the broader purpose of defending against the alleged fact(s) of violation.

In view of the foregoing, complainant's Motion to Strike Affirmative Defenses is hereby granted in part and denied in part.

Complainant's Motion to Strike Affirmative Defenses as it relates to respondent's second, rebuttable good faith affirmative defense to the charge set forth in Count I namely, that respondent allegedly knowingly hired and/or continued to hire after November 6, 1986 an unauthorized alien for employment in the Unitd States is hereby denied.

Complainant's Motion to Strike Affirmative Defenses as it pertains to respondent's first good faith affirmative defense, that which respondent seeks to assert in connection with the paperwork violations set forth in Count II of the complaint, is granted and that affirmative defense is hereby ordered stricken.

